Supreme Court, U.S.
FILED

No. (1)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

OFFICE OF THE CLERK

The Stone Casket Company of Oklahoma City,
Petitioner,

versus

State of Oklahoma, *ex. rel.*, State Board of Embalmers and Funeral Directors,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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April 20, 1999

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April 20, 1999

QUESTIONS PRESENTED FOR REVIEW

1. Are the equal protection guarantees of the Fourteenth Amendment violated where Oklahoma casket retailers are prevented by State law from competing with funeral homes, since the caskets being sold by each are substantially similar and the selling of such caskets does not impact the public health or safety?

2. Are the equal protection guarantees of the Fourteenth Amendment violated where Oklahoma casket retailers are required by State law to be licensed embalmers in order to sell caskets to the public, yet out-of-state and Internet casket retailers may sell caskets to the public in Oklahoma without such licensing required?

3. May the Oklahoma Funeral Licensing Act be enforced when it is unconstitutionally vague and ambiguous as written?

4. Is it a violation of due process when an appellate court grants injunctive relief, depriving a party of its livelihood and property, where such party has not had an opportunity for a full hearing on each claim raised at the district court?

PARTIES

The parties to the appeal before the Supreme Court of the State of Oklahoma were the Stone Casket Company of Oklahoma City, defendant in the District Court, appellees in the Court of Civil Appeals and petitioners herein and the State of Oklahoma, *ex. rel.*, State Board of Embalmers and Funeral Directors, plaintiff in the District Court and the appellant in the Court of Civil Appeals.

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Neither the Opinion of the District Court nor the Opinion of the Court of Civil Appeals were reported in any reporter as of the date of this Petition. Those Opinions are set forth in the Appendix hereto.

GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order of the Oklahoma Supreme Court, Case No. 90, 123, filed and entered by that Court on February 2, 1999. Jurisdiction in this Court is conferred under 28 U.S.C. § 1257.

STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant portions of OKLA.STAT. tit. 59, § 395.1, *et. seq.* (Supp.1997), the Oklahoma Funeral Services Licensing Act, are set forth in the Appendix hereto.

STATEMENT OF THE CASE

The State of Oklahoma, *ex rel.*, State Board of Embalmers and Funeral Directors ("Respondent" or the "State"), filed a Petition for a Permanent Injunction and an Application for a Temporary Restraining Order seeking to enjoin Stone Casket Company ("Petitioner" or "Stone Casket") from selling caskets to the public in violation of the Oklahoma Funeral Services Licensing Act (the "Act"). The matter was set before the Honorable Judge Amick, District Court Judge of Oklahoma County (hereinafter referred to as the "District Court"). The District Court issued the Temporary Restraining Order and subsequently set the matter for hearing on the Temporary Injunction.

Stone Casket filed an Answer to the Petition for Permanent Injunction, as well as a Petition for Declaratory Action to determine the constitutionality of the Act. Stone Casket alleged in its Declaratory Petition that the statutes violated its equal protection rights under both the United States and Oklahoma Constitutions.

On April 30, 1997, a hearing was held on all issues and the District Court dissolved the Temporary Restraining Order and denied Respondent's request for a Temporary

Injunction. The District Court then declared OKLA.STAT. tit. 59, §§396.3a(1)(c). 396.6(A)(Supp.1997) to be unconstitutional. The District Court concluded that the above-referenced statutory provisions violated the Equal Protection Clause of both the Oklahoma and United States Constitutions.

Respondent then filed a Motion to Reconsider and a Motion to Stay the District Court's Order. The request for reconsideration of the constitutionality of the statutory provisions was denied. Respondent then appealed the District Court's decision and the appeal was heard before the Oklahoma Court of Civil Appeals, Division 1 (the "Court of Civil Appeals").

The Court of Civil Appeals issued its Order on October 2, 1998, reversing the District Court's decision. The Court of Civil Appeals found that the Act was constitutional. That Court then granted injunctive relief to the Respondent, restraining Stone Casket from selling caskets to the general public. Stone Casket petitioned the Court of Civil Appeals for rehearing and the Court denied the Petition on November 9, 1998.

Stone Casket then petitioned the Supreme Court of the State of Oklahoma for a Writ of Certiorari and the Court denied the Petition on February 2, 1999.

REASONS FOR ALLOWING THE WRIT

This case presents this Court an opportunity to review the validity of an Oklahoma Statute that unconstitutionally restricts who may sell caskets within the State of Oklahoma as well as an opportunity to resolve the conflict currently existing among the States regarding regulation of the funeral industry.

The Opinion issued by the Oklahoma Court of Civil Appeals should be reviewed for several reasons. First, the decision of the appellate court is not in accord with the applicable decisions of this Court. Second, the appellate decision involves a compelling public policy concern on an issue that will affect each State's regulation of the funeral industry as well as the constitutional rights of each citizen within the State of Oklahoma. Third, the state court decision is in conflict with federal court decisions from other jurisdictions.

The appellate Opinion merits review because the Funeral Services Licensing Act violates the equal protection provisions guaranteed by the Fourteenth Amendment of the United States Constitution. The Act treats unequally those situated in a similar class without a rational basis related to a legitimate

state goal or interest. *See. Romer v. Evans*, 517 U.S. 620 (1996). Stone Casket is merely a retailer: it does not provide any funeral services such as embalming or burial. Under the Act, Stone Casket is prohibited from selling caskets to the public since it is not licensed to perform such funeral services. However, it is permissible under Oklahoma law for an out-of-state or Internet retailer who is not so licensed to sell caskets to the public in Oklahoma.

Oklahoma residents can and do purchase similar caskets over the Internet and the telephone from unlicensed entities, and the State readily accepts caskets from these unlicensed entities for burial. There is no rational basis for the distinction between Oklahoma casket retailers and out-of-state or Internet retailers. Nor is there a rational basis for the distinction between Oklahoma casket retailers and Oklahoma funeral homes.

There are no public health or safety risks associated with the sale of a casket by an Oklahoma retailer who is not a licensed funeral director since no funeral services such as embalming or burial services are provided. The Court of Civil Appeals, in reversing the District Court's finding that the Act as applied to Stone Casket is unconstitutional, held that there was some rational basis for distinguishing among Oklahoma casket

retailers and Oklahoma funeral homes, citing public safety and sanitation concerns. However, the State itself admitted before the District Court that public health and safety issues were not concerns of the State. Furthermore, there can be no public safety or sanitation concerns surrounding the sale of the casket where no funeral services such as embalming or burial are being provided. It was undisputed that the caskets sold by Stone Casket are identical to those sold by Oklahoma funeral homes. Thus, applying the standard for equal protection as set out by this Court, the Funeral Services Licensing Act is unconstitutionally discriminatory. The Court of Civil Appeals' ruling to the contrary is not in accord with this long standing precedent.

Moreover, the Act is unconstitutionally vague and ambiguous. Several definitions within the Act are circular and incomprehensible. The circularity comes in part from the fact that Appellant claims that Stone Casket cannot sell caskets without a license under the Act, yet Stone Casket is not eligible for a license under the Act because it is neither a funeral director nor a funeral service establishment. OKLA.STAT. tit. 59, § 396.2a (Supp.1997).

In defining "funeral establishments," the Act clearly excludes Stone Casket since it does not provide services for the care and preparation for burial or transportation of dead human remains. However, under the definitional provisions of the Act, Stone Casket cannot sell caskets to the public unless licensed by the Board to provide services for the care and preparation for burial or transportation of dead human remains. Technically, Stone Casket is not a funeral services establishment, yet it is required under the Act to become licensed as one simply to sell caskets from a showroom. Accordingly, the circular references of these provisions of the Act are not capable of reasonable interpretation and are therefore vague and ambiguous on their face.

The appellate Opinion further requires review because it radically departs from case law interpreting the constitutional guarantee of life, liberty, and the pursuit of happiness found in the Fourteenth Amendment. It is elementary that federal common law and Oklahoma law require clear and convincing proof of four elements before injunctive relief can be issued. *See Pottawatomie Indian Tribe v. Enterprise Management Consultants, Inc.*, 883 F.2d 886 (10th Cir.1989); *House of Sight & Sound, Inc. v. Faulkner*, 912 P.2d 357 (Okla.App.1995).

These elements include whether the party seeking injunctive relief has a substantial likelihood of success on the merits; whether irreparable injury will occur if the injunction is not granted; whether this potential injury outweighs any damage to the other party; and whether the injunction would be adverse to the public interest.

Here, no proof was offered on several of those mandatory elements. In fact, the State acknowledged that the trial court resolved less than all the issues between the parties. Nevertheless, the Court of Appeals specifically instructed the District Court to enjoin Stone Casket from continuing to operate its business in the State of Oklahoma. This portion of the appellate Opinion is no more than an unlawful exercise of power depriving Stone Casket of its livelihood and property without the due process guaranteed by law, clearly departing from the decisions of this and other tribunals. Stone Casket was entitled to a hearing before the District Court on the propriety of injunctive relief after the Court of Civil Appeals reversed the ruling on the unconstitutionality of the statutory licensure provision at issue.

Furthermore, injunctive relief is inappropriate because Stone Casket raised many challenges to the statute's

constitutionality before the District Court that were neither the basis of, nor rejected by, the ruling declaring the statute unconstitutional. These challenges raised by Stone Casket have not been attacked on appeal by the State or the Court of Civil Appeals. Even if the District Court's ruling is properly reversed, injunctive relief is inappropriate because Stone Casket raised other challenges to the statute, including vagueness, restraint of trade, and commerce clause concerns.

Whether retailers such as Stone Casket can constitutionally offer the bereaved a cost-effective choice of caskets, or whether funeral homes shall have a monopoly over in-state casket sales, is an issue of public concern that will impact every citizen within the State of Oklahoma as well as impact the funeral industry and citizens on a national level.

In 1983, the Federal Trade Commission ("FTC") enacted its "funeral services rule" to ensure that consumers have the right to choose from whom they purchase a casket in response to widespread concerns about the cost of funeral services and funeral home abuses. *See*, 16 C.F.R. § 453, *et seq.*; *see also*, *Harry and Bryant Co., et al., v. Federal Trade Commission*, 726 F.2d 993 (4th Cir. 1984). The funeral services rule caused the rebirth of the

independent third party casket seller. These independent casket sellers, like Stone Casket, are not funeral directors or embalmers, but merely retailers offering a choice to the bereaved to purchase similar if not identical caskets at lower prices. The very same compelling public policy underlying the FTC funeral services rule is at issue here.

The State characterized this as a matter of public policy, stating its sole justification for its application of the statute to Stone Casket was that the public needs to be "protected" from the possibility that a hypothetical retail casket seller might sell a consumer something other than what it bargained for. The FTC in enacting its funeral services rule did indeed identify consumer fraud, but on the part of funeral homes which monopolized casket sales and misled customers. This public concern led the FTC to require funeral homes to accept caskets from other retailers.

If the injunction stands against Stone Casket Company, Oklahoma casket retailers will be barred from selling caskets while out-of-state retailers will be permitted to sell caskets. Under the FTC regulations, Oklahoma funeral homes must accept caskets from independent casket retailers; therefore, the State is required to accept caskets from

independent, unlicensed retailers who are located outside of Oklahoma. Thus, the Act singles out independent Oklahoma retailers and denies them equal protection under the law. The injunction will also have the effect of enforcing a monopoly for Oklahoma funeral homes and circumvent the FTC regulations by making it more difficult to obtain caskets in Oklahoma from independent retailers. This denies Oklahoma citizens of the very rights the FTC is seeking to protect. The Court of Civil Appeals Opinion overlooks this compelling public concern. Moreover, the Court of Civil Appeals Opinion is in direct conflict with a federal court from a different jurisdiction.

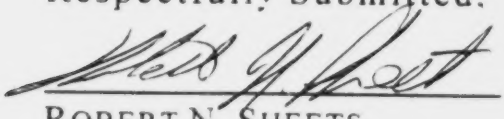
On November 3, 1998, in *Peachtree Caskets Direct, Inc., v. State Board of Funeral Service of Georgia*, U.S.D.C. N.D. Ga., Case No. 1:98-CV-3084-MHS, the United States District Court for the Northern District of Georgia issued a temporary restraining order enjoining the State of Georgia from enforcing a Georgia statute identical to the Act at issue before this Court. The District Court for the Northern District of Georgia found the Georgia statute unconstitutional, finding no legitimate state interest in requiring a casket retailer to be a licensed funeral director. As the federal District Court Opinion demonstrates, conflict between the Oklahoma courts and federal

courts already exists and the potential for even more conflict arising among the States and between state courts and the federal courts is great. Therefore. this case presents this Court an opportunity to resolve this conflict.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant a Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully Submitted,



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APPENDIX A

RELEASE FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA DIVISION I

COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
OCT 2 1998
JAMES W. PATTERSON
CLERK

STATE OF OKLAHOMA ex rel. STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS, Plaintiff/Appellant,	)	
versus	)	Case No. 90,123
THE STONE CASKET COMPANY OF OKLAHOMA CITY; Defendant/Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA
HONORABLE JOHN AMICK, JUDGE

REVERSED AND REMANDED

W.A. Drew Edmondson,
Attorney General of Oklahoma,
Joseph L. McCormick, IV,
Assistant Attorney General,
Oklahoma City, Oklahoma. For Plaintiff/Appellant.

Melvin R. McVay, Jr.,
Heather L. Hintz,
Phillips McFall, McCaffrey, McVay & Murrah,
Oklahoma City, Oklahoma, For Defendant/Appellee.

OPINION

GARRETT, Judge:

¶1 Appellee, The Stone Casket Company of Oklahoma City, was selling caskets directly to the public. Appellant, The State of Oklahoma ex rel. State Board of Embalmers and Funeral Directors, filed an action for injunction and an application for temporary restraining order against the Casket Company alleging it was unlicensed, and therefore was violating 59 O.S. 1991 § 396.6.[1] The court issued a temporary

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[1] That statute provides in pertinent part

> A. No person shall operate a funeral establishment or limited service establishment, engage in the sale of any funeral service merchandise to the public, provide funeral services, carry on the business or profession of embalming or funeral directing or perform any of the functions, duties, or powers prescribed for funeral directors or embalmers pursuant to the provisions of the Funeral Services Licensing Act unless such person has obtained

restraining order (TRO), restraining Casket Company from selling caskets. Casket Company sought to dissolve the TRO and filed an answer to the petition seeking to establish the unconstitutionality of 59 O.S. 1991 §§ 396.2(2)(d), 396.3(a)(1)(c), and 396.6(A)[2]. It was uncontroverted at trial that Casket Company was solely in the business of selling caskets to the public, and did not otherwise engage in the care and preparation of human remains for burial. Casket Company contended the statutes violate both the Oklahoma and United States Constitutions. Upon hearing, the court found the above statutes to be unconstitutional pursuant to Oklahoma Constitution, Art. 2, Sec. 2,[3] insofar as the statutes

---

the license specified by rules and regulations promulgated pursuant to the Funeral Services Licensing Act and has otherwise complied with the provisions of the Funeral Services Licensing Act. Said license shall be nontransferable and nonnegotiable.

[2] 59 O.S. 1991 §396.2(2)(d) provides:

2. "Funeral director" means a person who:

***

d. sells funeral services merchandise to the public;

59 O.S. 1991 §396.3(a)(1)(c) provides:

The following persons, professions and businesses shall be required to be licensed pursuant to the Funeral Services Licensing Act:

1. Any person engaged or who may engage in:

***

c. the sale of any funeral service merchandise, or

[3] Art. 2, Sec. 2 provides:

All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

required a person to be licensed to sell caskets and dissolved the temporary restraining order. The court found there was no compelling state interest which would require a person who is solely in the business of selling caskets to meet the same qualifications as funeral directors or embalmers or to be held to the same standards which the State requires of funeral directors. State Board's motion to reconsider was denied. The State Board also sought a stay of the court's order declaring §396.6 unconstitutional. The stay was granted. The court found its order to be final for purposes of appeal.

¶2 State Board contends the court erred in finding the above statutes unconstitutional and, the court abused its discretion in denying State's request for an injunction to enforce them against Casket Company. The Equal Protection Clause of the Fourteenth Amendment requires that no state "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause requires only that the classification "rationally further a legitimate state interest" unless a classification "jeopardizes exercise of a fundamental right" or it "characterizes based upon an inherently suspect characteristic." ***Nordlinger v. Hahn***, 505 U.S. 1,112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (citing ***Cleburne v. Cleburne Living Center, Inc.***, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); ***New Orleans v. Duke***, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

¶3 We hold there is no overriding fundamental right jeopardized and no suspect class is involved. We must determine whether the statutes, insofar as they affect a citizen's right to sell caskets, rationally furthers a legitimate state interest. We hold the statutes do, and therefore the lower court's finding of unconstitutionality is reversed. The State has a

legitimate interest in regulating funeral services because those services relate to the preparation and disposal of human remains. Such laws protect the public health and safety of the citizens of Oklahoma. Caskets are directly involved in the burial of human remains. A casket is a part of the funeral service business and cannot be separated as an independent item. The casket, in which human remains are buried directly impacts sanitation.[4] The State may enact laws which protect the public's health and welfare and which protect the environment. ***State of Oklahoma v. McDonald***, 1989 OK CIV APP ____, 787 P.2d 466. In ***Ex parte Herrin***, 1939 OK CR ____, 93 P2d 21, the court upheld legislation that directly affected the health and safety of the public and held that professions which affect the same may be regulated under the police power of the State. Here, the State showed a rational relationship and a legitimate state interest which would require such licensing. The court's judgment that the statutes requiring licensing are unconstitutional must be reversed. Licensing is one of the proper and much used methods of enforcing safety and sanitation rules.

¶4 The State contends the trial court erred when it relied upon early equal protection cases and urges us to consider only more recent cases. Since we hold that the manufacture and sale of caskets is part and parcel of the funeral service business, and regulating that business and licensing qualified persons engaged therein is a proper exercise of the police power of the State, we need not consider that issue further. We reverse with

---

[4] Theoretically, the Oklahoma public could obtain the same casket sold by Casket Company from telephone sales by out of state casket sellers or, sales via the Internet without either of these sellers being licensed by the State of Oklahoma. It is apparent to this Court that the State of Oklahoma may prohibit the importation into this state of contraband property. This certainly includes caskets which may not comply with construction requirements and fail to prevent contamination of the environment. Licensing is a proper method for enforcement of safety and health rules.

directions to the lower court to enter judgment for State Board against Casket Company as prayed. which includes the requested injunction.

REVERSED AND REMANDED.

JOPLIN. P.J.. concurs: JONES. V.C.J.. dissents.

APPENDIX B

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, Ex Rel., STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS,	)	
PLAINTIFF,	)	
vs.	)	**CJ-97-2364**
THE STONE CASKET COMPANY, OF OKLAHOMA CITY,	)	
DEFENDANT.	)	

HEARING HAD ON THE 30TH DAY OF APRIL, 1997 BEFORE THE
HONORABLE JOHN AMICK, DISTRICT JUDGE

APPEARANCES:

Mr. Joseph L. McCormick, IV, Assistant Attorney General, State Capitol Building, Room 112, Oklahoma City, Oklahoma, appearing on behalf of the Plaintiff the State Board of Embalmers and Funeral Directors.

Mr. Kwame T. Mumina, Attorney at Law, One Leadership Square, 12th Floor, Oklahoma City, Oklahoma, appearing on behalf of the Defendant Stone Casket Company of Oklahoma City.

REPORTER:
Barbara A. Ross, C.S.R., R.P.R.
Official Court Reporter
Oklahoma County Courthouse
Oklahoma City, Oklahoma
(405) 278-1429

BY THE COURT: The problem here involves the construction of an Oklahoma statute, that is Title 59, Oklahoma statute of 1991, Section 396.6. And the key part the statute says "No person shall operate a funeral establishment or limited service establishment, engage in the sale of any funeral service merchandise to the public "or do any other things without being licensed unless such person has obtained a license specified in the rules and regulations promulgated pursuant to the Funeral Service Licensing Act and as complied with the provisions and so.

Now, the first question is whether caskets is funeral service merchandise? I don't think there is really any serious debate about that. The casket is the central piece in the funeral service and so I think there isn't much question as to whether it is funeral service merchandise.

The next question is whether there is a rational basis for the law holding that anybody who sells a casket must be a licensed funeral - under The Funeral Services Licensing Act. Now, this is a problem where - this is the point where I think I have to differ with the State of Oklahoma. It doesn't seem to me that there is any rational basis for holding that somebody who sells a casket must be a licensed funeral director. Now, there is perfectly good reasons for requiring that anybody who conducts a funeral, who handles dead remains of human beings, or deals with the people who recently have been bereaved be licensed and have some experience in that area; but I do not see the reason, any rational basis, for a law which requires somebody who sells a casket be a licensed funeral director or a mortician or embalmer or anything like that. So I don't -I think this statute insofar as it applies to one who sells a casket is unconstitutional. The Oklahoma Constitution, as the defendant argues, provides - that is Article Two, Section Two. "That all persons have the inherent right to life, liberty and the pursuit of happiness and the enjoyment of the gains of their own industry." Pursuant to that

constitutional provision back in 1952, the Oklahoma Supreme Court held that it was arbitrary, discriminatory and not designed to promote the general welfare to require that somebody who wanted to practice the art of watch making serve as an apprentice for four years. They held that requirement by the board of examiners for the watch makers was arbitrary, discriminatory and unreasonable. By the same token, I think it is arbitrary, discriminatory and unreasonable to require that somebody who sells a casket in this state must be licensed under The Funeral Services Licensing Act. Particularly in view of the fact that a person outside this state can certainly sell a casket to somebody within the state and without a violation of the law. There doesn't seem to be any provision in the law that requires somebody outside the state, before they can import a casket here, be licensed.

So, as my bailiff pointed out, what could happen here, and be perfectly lawful, apparently, and conform with this statute, was an out-of-state casket maker could set up a showroom here in this state and say "Now, we have these caskets. We can't sell them here in this state, but you can go to Dallas, Texas, or Wichita, Kansas, or wherever and we will sell that casket to you." Now, there isn't any reason for any such distinction as that in the first place.

In the second place, there isn't anything unlawful about selling a casket here in this state to be a licensed funeral director. Now, there isn't any, in my opinion at least, there isn't any rational basis for saying that "You, Stone Casket Company, can sell your caskets to a licensed funeral director but you cannot sell them to the general public." A rational basis for that escapes me. And when you see something like this, of course, the funeral directors certainly have a right to some protection, but you can't – I can't escape the impression that this prohibition on persons who are not properly licensed was enacted purely to protect the

profits of the licensed funeral directors. I think that as it applies to caskets and as it applies to Stone Casket Company, I think it is arbitrary and discriminatory and for that reason in violation of the constitution of both of the State of Oklahoma and of the United States.

So in view of my opinion on that score, I will decline to - first of all, I will dissolve the temporary restraining order and secondly I will decline to issue a temporary injunction.

Now, I recognize that this is matter of statewide importance and I have strong doubts that my decision in the matter will be the last decision made by a court in that; so I am perfectly willing to certify this as a proper order for appeal if the attorney general desires to appeal it.

APPENDIX C

OKLAHOMA COUNTY DISTRICT COURT
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA
June 20, 1997
PATRICIA PRESLEY, COURT CLERK

THE STATE OF OKLAHOMA, Ex Rel., STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-97-2364
STONE CASKET COMPANY OF OKLAHOMA CITY,	)	
Defendant.	)	

JOURNAL ENTRY AND ORDER

This matter comes on for hearing upon Plaintiff's Motion for Temporary Restraining Order and Temporary Injunction filed by the State of Oklahoma, ex rel., State Board of Embalmers and Funeral Directors (the Board) against Stone Casket Company of Oklahoma City (Stone Casket). Contemporaneous with the Motion, the Board also filed its Motion for Injunctive Relief, seeking temporary and permanent injunction to enjoin and prohibit Stone Casket from selling

caskets to the public, asserting violation of 59 O.S. Supp. 1996, §§ 396, *et seq*

This Court issued its Temporary Restraining Order on April 8, 1997. Stone Casket has responded by moving to dissolve the Temporary Restraining Order and further asks the Court to deny the State's request for a temporary and permanent injunction.

The Court finds that there is no rational relationship which would require a person who only is in the business of selling caskets to meet the same qualifications as funeral directors or embalmers or to be held to the same standards by the Board as funeral establishments. The Court further finds that pursuant to the Act, the policing and regulatory powers of the Board in requiring the same standards for a person who only sells caskets and not otherwise engaged in the funeral services business as a person engaged in such funeral service business is an unreasonable exercise of policy powers. Effectively, the Act operates as an unreasonable interference and abridgment of Stone Casket to conduct its business. The Court finds that such restraints are not only unreasonable and unnecessary, but unlawful.

The Oklahoma Constitution at Article 2, § 2 provides that all persons have the inherent right to life, liberty and the pursuit of happiness, and the enjoyment of the gains of their own industry. Since the Act operates to prohibit Stone Casket from conducting its legitimate business without a rationale basis under the statute and the licensure provisions are arbitrary, discriminatory and not designed to promote the general welfare, the Act is unlawful and unconstitutional.

ACCORDINGLY, IT IS ORDERED that the temporary restraining order shall be and hereby is dissolved. FURTHER, IT IS ORDERED, the Petition for Injunctive Relief seeking a temporary and permanent restraining order shall be and hereby is denied.

FURTHER, IT IS ORDERED, the provisions of 59 O.S. Supp. §§ 396, et seq., including § 396.2(2)(d); § 396.3a(1)(c); and § 396.6(A), insofar as those provisions require a person to be licensed to sell caskets, are hereby declared unconstitutional in violation of the Constitution of both the State of Oklahoma and the United States and shall be null and void.

Dated this 20th day of June, 1997.

/s/ JOHN M. AMICK
JUDGE OF THE DISTRICT COURT

Approved as to Form:

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APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 2 1999
JAMES W. PATTERSON
CLERK

Tuesday, February 2, 1999

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

90,123 State of Oklahoma ex rel. State Board of Embalmers & Funeral Directors v. The Stone Casket Company of Oklahoma City.
Certiorari denied.

CONCUR: Hargrave, V.C.J., Lavender, Wilson, Kauger, Watt, JJ.

Opala, J., with whom Summers, C.J., joins, dissenting: I would grant certiorari to settle the question tendered.

NOT VOTING: Hodges, J.
ABSENT: Simms, J.

/s/ Hardy Summers
CHIEF JUSTICE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. ATLANTA
NOVEMBER 3, 1998
LUTHER D. THOMAS, CLERK

PEACHTREE CASKETS DIRECT, INC., THOMAS ALLEN HICKS, and THELMA JACO,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE
STATE BOARD OF FUNERAL SERVICE OF GEORGIA; BOBBY L. COBB, in his official capacity as President of the State Board of Funeral Service; LEWIS A. MASSEY, in his official capacity as Secretary of State of Georgia; WILLIAM G. MILLER, Jr., in his official capacity as Joint Secretary, State Examining Boards,	)	NO. 1.98-CV-3084-MHS
Defendants.	)	

TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION

Plaintiff's motion for a temporary restraining order, pursuant to Fed.R.Civ.P. 65, came on before me regularly to be heard on November 2, 1998. Defendants were notified in advance, filed a written brief, and appeared at the hearing through counsel. At the hearing, all parties presented evidence and argued

Based on the evidence, argument, and entire record, the Court finds as follows:

(1) there is a substantial likelihood of success by plaintiffs on the merits inasmuch as it appears that the law in question, O.C.G.A. §§ 43-18-1, *et seq.*, purports to make the unlicensed sale of caskets and alternative containers for human remains unlawful only by implication resulting in a substantial likelihood of unconstitutional vagueness and it appears that the purported prohibition on the sale of caskets and alternative containers is not rationally related to a legitimate state interest;

(2) there is a substantial threat of irreparable injury to plaintiffs if defendants are not enjoined;

(3) the threatened injury to the plaintiffs outweighs the injury to the nonmovants; and

(4) the injunction would not disserve the public interest.

Regarding the giving of security as provided in Rule 65(c), the Court finds that there is no risk that defendants will suffer costs and damages from being wrongfully enjoined or restrained. Exercising its discretion, the Court, therefore, will

require that plaintiffs give security only in the amount of $1.00. Plaintiffs shall post this amount with the Clerk.

Until further Order of the Court, defendants are hereby RESTRAINED and ENJOINED from taking any action pursuant to O.C.G.A. §§ 43-18-1, *et seq.*, to prevent or restrict plaintiffs or other persons from selling caskets or alternative containers for human remains in Georgia. Defendants may not require funeral director or funeral establishment licensing for the sale of caskets or alternative containers for human remains. This Order applies to all defendants, their officers, agents, servants, employee, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

IT IS SO ORDERED, this the 3rd day of November, 1998.

\s\ MARVIN H. SHOOB
Senior Judge
United States District Court

Presented by:

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APPENDIX F

RELEVANT PORTIONS OF THE OKLAHOMA FUNERAL SERVICES LICENSING ACT

OKLA. STAT. tit. 59, § 396.2.

Definitions

As used in the Funeral Services Licensing Act:

1. "Embalmer" means a person who disinfects or preserves dead human remains, entire or in part, by the use of chemical substances, fluids or gases in the remains, or by the introduction of same into the remains by vascular or hypodermic injection, or by direct application into organs or cavities;

2. "Funeral director" means a person who:

a. is engaged in or conducts, or holds himself out as being engaged in preparing for the burial or disposal and directing and supervising the burial or disposal of dead human remains,
b. is engaged in or conducts or holds himself out as being engaged in maintaining a funeral establishment for the preparation and the disposition, or for the care of dead human remains,
c. uses, in connection with his name or funeral establishment, the words "funeral director" or "undertaker" or "mortician" or any other title implying that he is engaged as a funeral director, or
d. sells funeral service merchandise to the public;

3. "Funeral establishment" means a place of business used in the care and preparation for burial or transportation of dead human remains, or any place where any person or persons shall hold forth and be engaged in the profession of undertaking or funeral directing;

4. "Apprentice" means a person who is engaged in learning the practice of embalming or of the practice of funeral directing, as the case may be, under the instruction and personal supervision of a duly-licensed embalmer or a duly-licensed funeral director of and in the State of Oklahoma, pursuant to the provisions of the Funeral Services Licensing Act, and who is duly registered as such with said Board;

5. "Board" means the Oklahoma State Board of Embalmers and Funeral Directors;

6. "Directing a funeral" or "funeral directing" means directing funeral services from the time of the first call until interment or entombment services are completed, or until the remains are released for transport to a crematorium, or released to a public carrier;

7. "First call" means the beginning of the relationship and duty of the funeral director to take charge of dead human remains and have such remains prepared by embalming, cremation, or otherwise, for burial or disposition, provided all laws pertaining to public health in this state are complied with. First call does not include calls made by ambulance, when the person dispatching the ambulance does not know whether or not dead human remains are to be picked up;

8. "Personal supervision" means the physical presence of a licensed funeral director or embalmer at the specified time and place of the providing of acts of funeral service;

9. "Limited service establishment" means a fixed place of business consisting of an equipped preparation room, and other rooms as necessary, for the specified purpose of performing preparation and shipping services of dead human remains to funeral establishments inside and outside this state;

10. "Funeral service merchandise or funeral services" means those products and services normally provided by funeral establishments, including, but not limited to, the sale of burial supplies and equipment, but excluding the sale by a cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments, equipment, crypts, niches or outer enclosures; and

11. "Outer enclosure" means a grave liner, grave box, or grave vault.

OKLA. STAT. tit. 59, § 396.3.

Qualifications and examination of funeral directors and embalmers--Approved schools:

A. The Oklahoma State Board of Embalmers and Funeral Directors shall determine the qualifications necessary to enable any person to practice as a funeral director or embalmer, and prescribe the requirements for a funeral establishment, limited service establishment or funeral service merchandise license. The Board shall examine all applicants for licenses to practice as a funeral director or embalmer. The Board shall issue the proper licenses to applicants who successfully pass such examination and qualify pursuant to any additional requirements the Board may prescribe.

B. The minimum requirements for a license to practice funeral directing or embalming, or both, are as follows:

1. An applicant for a license to practice embalming shall be at least twenty (20) years of age, a legal resident of this state, a citizen of the United States, and of good moral character. In addition, said applicant shall have at least sixty (60) accredited hours of study from an accredited college or university or equivalent as determined by the Board, shall be a graduate of a school of mortuary science accredited by the Conference of Funeral Service Examining Boards of the United States and approved by the Board, and have served one (1) year as a registered apprentice. The applicant may serve as a registered apprentice prior to enrollment in an approved school of mortuary science, or subsequent to graduation from said school.

Curriculum of study for an embalmer in a school of mortuary science shall include the following subjects:

a. mortuary science to include embalming technique, chemistry of embalming, color harmony, discoloration and its causes, effects, and treatment, treatment of special cases, restorative art, funeral management, professional ethics; and
b. anatomy; and
c. organic and inorganic chemistry; and
d. pathology; and
e. microbiology; and
f. sanitation and hygiene; and
g. public health regulations; and
h. mortuary law and administration.

2. An applicant for a license to practice as a funeral director shall be a licensed embalmer or shall have available a licensed embalmer. An applicant who graduates from an approved school of mortuary science, having an integrated course of study for an embalmer and funeral director, may make application to take an examination for both licenses. If the applicant graduates from a school of mortuary science granting a certificate of graduation as a funeral director, said applicant shall also complete the following subjects:

a. mortuary management and administration; and
b. business education, including business law; and
c. legal medicine and toxicology (as it pertains to funeral directing); and
d. public relations and psychology; and
e. public health, hygiene and sanitary science.

C. The Board shall issue the appropriate license to any qualified applicant whose application has been approved by the Board, and who has paid the fees required by Section 396.4 of this title, has passed the required examination with a general average of not less than seventy-five percent (75%) and has demonstrated to the Board proficiency as an embalmer or funeral director.

D. The Board shall maintain for public inspection a list of all accredited schools of embalming and mortuary science.

OKLA. STAT. tit. 59, § 396.3a.

Persons and businesses required to be licensed:

The following persons, professions and businesses shall be required to be licensed pursuant to the Funeral Services Licensing Act:

1. Any person engaged or who may engage in:

a. the practice or profession of funeral directing or embalming,
b. maintaining the business of a funeral establishment or limited service establishment,
c. the sale of any funeral service merchandise, or
d. providing funeral services; and

2. Any funeral establishment or limited service establishment.

OKLA. STAT. tit. 59, §396.6.

License required--Employment of licensed embalmer--Recordation of license:

A. No person shall operate a funeral establishment or limited service establishment, engage in the sale of any funeral service merchandise to the public, provide funeral services, carry on the business or profession of embalming or funeral directing or perform any of the functions, duties, or powers prescribed for funeral directors or embalmers pursuant to the provisions of the Funeral Services Licensing Act unless such person has obtained the license specified by rules and regulations promulgated pursuant to the Funeral Services Licensing Act and has otherwise complied with the provisions of the Funeral Services Licensing Act. Said license shall be nontransferable and nonnegotiable.

B. A license shall not be issued to any person for the operation of a funeral or embalming establishment which does not employ an embalmer licensed pursuant to the provisions of Section 396.3 of this title. An individual who supervises a funeral or embalming establishment shall be licensed pursuant to the provisions of Section 396.3 of this title.

C. The holder of any license issued pursuant to the Funeral Services Licensing Act, or any rules and regulations promulgated pursuant thereto, shall have such license recorded in the office of the county clerk in the county in which the licensee is engaged in such funeral business.

Supreme Court, U.S.
FILED
JUN 1 1999
CLERK

No. 98-1763

In The

Supreme Court of the United States

THE STONE CASKET COMPANY
OF OKLAHOMA CITY,

Petitioner,

versus

STATE OF OKLAHOMA, *ex rel.*,
STATE BOARD OF EMBALMERS
AND FUNERAL DIRECTORS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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June 1, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oklahoma Court of Civil Appeals erred in concluding that 59 OKLA. STAT. Tit. 59, §§ 396.3a(1)(c) and 396.6(A) were constitutional.

2. Whether the Oklahoma Court of Civil Appeals properly analyzed the Equal Protection claim presented in this case.

PARTIES

The parties to this appeal before the Supreme Court of the State of Oklahoma were the Stone Casket Company of Oklahoma City, defendant in the District Court, appellees in the Court of Civil Appeals and petitioners herein and the State of Oklahoma, *ex rel.*, State Board of Embalmers and Funeral Directors, plaintiff in the District Court and the appellant in the Court of Civil Appeals.

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GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order of the Oklahoma Supreme Court, Case No. 90, 123, filed and entered by that Court on February 2, 1999. Jurisdiction in this Court is conferred under 28 U.S.C. § 1257.

STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant portions of OKLA. STAT. Tit. 59, §§ 396.3a(1)(c), 396.6(A) (Supp. 1997), the Oklahoma Funeral Services Licensing Act, are set forth in the Petitioner's Appendix.

STATEMENT OF THE CASE

The State of Oklahoma, *ex rel.*, State Board of Embalmers and Funeral Directors ("Respondent" or the "State"), filed Petition for a Permanent Injunction and an Application for a Temporary Restraining Order seeking to

enjoin Stone Casket Company ("Petitioner" or "Stone Casket") from selling caskets to the public in violation of the Oklahoma Funeral Services Licensing Act (the "Act"). The matter was set before the Honorable Judge Amick, District Court Judge of Oklahoma County (hereinafter referred to as the "District Court"). The District Court issued the Temporary Restraining Order and subsequently set the matter for hearing on the Temporary Injunction.

Petitioner filed an Answer to the Petition for Permanent Injunction, as well as a Petition for Declaratory Action to determine the constitutionality of the Act. Stone Casket alleged in its Declaratory Petition that the statutes violated its equal protection rights under both the United States and Oklahoma Constitutions.

On April 30, 1997, a hearing was held on all issues and the District Court dissolved the Temporary Restraining Order and denied Respondent's request for a Temporary Injunction. The District Court then declared OKLA. STAT. Tit. 59, §§ 396.3a(1)(c), 396.6(A) (Supp. 1997) to be unconstitutional. The District Court concluded that the above-referenced statutory provisions violated, among other things, the Equal Protection Clause of both the Oklahoma and United States Constitutions and, infringed on Petitioner's right to the pursuit of happiness and the enjoyment of gains of their industry.

The State then filed a Motion to Reconsider and a Motion to Stay the District Court's Order. The request for reconsideration of the constitutionality of the statute was denied; the District Court stayed the effect of its ruling until the matter was heard by the Oklahoma Supreme

Court. The State then appealed the District Court's decision and the appeal was heard before the Oklahoma Court of Civil Appeals, Division 1 (the "Court of Civil Appeals").

The Court of Civil Appeals issued an Order on October 2, 1998, reversing the District Court's decision. The Court of Civil Appeals found that the District Court erred in its determination that these statutes were unconstitutional and found that their enactment constituted a proper exercise of the police powers of the State. In so holding, the Court of Civil Appeals concluded that, since neither a fundamental right nor suspect classification was involved, the statutes should be reviewed under the rational basis test. In reviewing the statute under that test the Court concluded that there was a rational basis for the statutes and reversed the District Court's ruling. The Court of Civil Appeals then granted the injunctive relief to the State, restraining Petitioner from selling caskets to the general public. Petitioner Petitioned the Court of Civil Appeals for rehearing and the Court denied the Petition on November 9, 1998.

Petitioner then Petitioned the Supreme Court of the State of Oklahoma for a Writ of Certiorari and the Court denied the Petition on February 2, 1999.

REASONS FOR DENYING THE WRIT

The Writ of Certiorari should not issue in this case for several reasons.

First, there are no conflicts between the decisions of any federal appellate circuit courts and the decision reached by the Court of Civil Appeals. Petitioner has wholly failed to provide this Court with any conflicting circuit court decisions. Petitioner has cited *Peachtree Casket Direct, et al. v. State Board of Funeral Service of Georgia*, No. 1. 98-CV-3084-MHS to support its assertion of conflict of opinions. In reviewing *Peachtree*, it is clear that reliance on this case is misplaced. First, this is a District Court decision and has not become final. Next, and most important, *Peachtree* involves a statutory scheme that is clearly distinguishable from the Oklahoma statute. The Georgia District Court found the Georgia statute to be vague and, therefore, unenforceable. In the Georgia statute, the prohibition against selling caskets is found only in the definition provisions. (Appendix A). Unlike the Georgia statute, the Oklahoma statutes set out in two (2) separate provisions who may, or may not, sell caskets. (Petitioner's Appendix F6-F7).

Second, there are no substantive questions involved here. This Court has repeatedly held that there is a distinction between an important legal issue to the public and an important legal issue to the opposed party. *Layne A. Bowler Corp. v. Western Well Work, Inc.*, 261 U.S. 387, 393 (1923). In this case it is clear that the only interest involved is the interest of the Petitioner who would like to continue its illegal operation of the selling of caskets in the State of Oklahoma. At this time there are no other entities similarly situated as Petitioner in the State of Oklahoma.

Third, there is no public policy issue that will affect the State of Oklahoma's regulation of the funeral industry

as well as the constitutional rights of each citizen within the State. Petitioner asserts that there is such a concern; however, Petitioner did not make such assertion before the Oklahoma Supreme Court. Therefore, this should not be considered in this Court.

Fourth, the decision by the Court of Civil Appeals does not affect a substantial number of states. There are only six (6) states, including the State of Oklahoma, that have laws which limit the retail sale of caskets to licensed funeral directors and embalmers. In the past, this Court has granted certiorari in cases that involved important constitutional issues where the statutes in question were common to many jurisdictions. Thus, in *New York v. Ferber*, 458 U.S. 747, 749 FN2 (1982), this Court noted that the provisions of the New York Child Pornography statute under review had similar or identical counterparts in federal statutes and in statutes of forty-seven (47) other states. As previously noted, there are only five (5) other states that have statutes similar to Oklahoma's.

The Court of Civil Appeals' decision is completely in line with a long list of cases expounded by this Court, beginning with *Williamson v. Lee Optical*, 348 U.S. 483 (1955) and continuing through *City of New Orleans v. Duke*, 427 U.S. 297 (1976). The analysis used in an Equal Protection challenge under the United States Constitution has been well-stated in this line of cases. The Oklahoma Supreme Court has adopted the same approach and has frequently cited *Williamson* in cases involving equal protection challenges.

In the instant case, the Court of Civil Appeals relied upon the same equal protection analysis used in the

Williamson and *Duke* cases. (See Petitioner's Appendix A-4).

In reviewing the state statutes in question, the Court of Civil Appeals determined that the statutes were passed pursuant to the police powers of the state. The Court of Civil Appeals then determined that, as applied to Petitioner, the statutes did not infringe on a fundamental right nor did they create a suspect classification. The Court of Civil Appeals then determined that the statutes should be reviewed under the "rational basis" test. Like the Court in *Williamson* and *Duke*, supra, the Court of Civil Appeals was able to opine reasons for this legislation and concluded that the statutes were rationally related and, therefore, did not violate Petitioner's equal protection rights. Petitioner has proffered the case of *Romer v. Evans*, 517 U.S. 620 (1996), to support its contention that the case conflicts with Court of Appeals decisions. *Romer* is a case that is clearly distinguishable from the instant case. In *Romer*, the United States Supreme Court used a heightened standard of scrutiny when asked to review an amendment to the Colorado Constitution. The amendment made it illegal for any municipality or other government entity to pass any legislation that would protect the rights of gays and homosexuals, among other things.

In finding such classifications inherently suspect and repugnant to the Equal Protection Clause, the Court was unwilling to apply mere rationality to review the amendment. Instead, the Court reviewed the amendment with a heightened standard of scrutiny. The Court reasoned, where the statute on its face created a suspect class of individual (i.e. gays) and treated them different from

every other class and had a clear disparate impact on that group, the law, on its face, violated the Equal Protection Clause. This was evident in the following language:

> Amendment II confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from state law is unprecedented in jurisprudence. *Romer v. Evans*, 517 U.S. 620 (1996).

Thus, it is clear that the *Romer* decision does not in any way stray from the Court's familiar equal protection analysis as expounded in cases such as *Williamson v. Lee Optical*. Instead, *Romer* represented the Court's effort to use a heightened standard of scrutiny in a situation where an amendment clearly creates a class solely for the purpose of imposing a different set of rules. The Court eagerly pointed out that the adverse impact that the amendment had on a disfavorite class was the apparent aim of the legislature. *Romer v. Evans*, 517 U.S. 620 (1996). Unlike *Romer*, the instant case does not create a discrete and insular class. To the contrary, the statutes in question are regulatory statutes enacted under the state's police powers. Therefore, review of rationality is all that was required in this case. Thus, reliance on *Romer* is misplaced.

There is no conflict with the Federal Trade Commission's (FTC) regulation of funeral service merchandise. Petitioner cannot cite any federal case law dealing with FTC regulations which conflicts with the Court of Civil Appeals decision. This is because the FTC regulations

deal mostly with pricing and sales practices in the funeral industry and not with licensing.

Petitioner also alleges that there was a due process violation when the Court of Civil Appeals ordered the injunction to be issued. This argument, too, must fall in that the only issue before the Court of Civil Appeals was whether the statutes were constitutional. It had previously been established, during the district court proceeding, that Petitioner was selling caskets without a license in the State of Oklahoma. The only issue was whether the statutes were constitutional. If the statutes are constitutional, then the injunction should have been issued to the State of Oklahoma. Having previously dealt with that issue in the district court, the Court of Civil Appeals determined that there was no reason to re-try those issues and that the injunction should be issued.

Petitioner incorrectly asserts that it will be treated differently in that out of state caskets may be used in the State of Oklahoma. It is Petitioner's assertion that this will occur because the F.T.C. rules require funeral homes to accept caskets purchased elsewhere. While it is true that the F.T.C. requires funeral homes to accept caskets purchased elsewhere, the F.T.C. does not address who may sell caskets in the State of Oklahoma. As a matter of fact, the Court of Civil Appeals addressed the issue of "contraband caskets" in its Opinion at FN4 (See Petitioner's Appendix at A-5).

CONCLUSION

This case involves a review of several pieces of economic legislation. These statutes were enacted to protect the public health, safety and welfare of the State of Oklahoma. They were passed pursuant to the state's police powers in response to an equal protection challenge. The Oklahoma Court of Civil Appeals relied upon the analytical approach used by this Court in a long line of cases beginning with *Williamson v. Lee Optical* and including *The City of New Orleans v. Duke* and concluded that there were no fundamental rights or suspect classifications involved. Thus, the statutes should be reviewed under the rational basis test. The Court of Civil Appeals, like this Court in *Duke* and *Williamson*, opined several reasons for these statutes and concluded that they were constitutional. This decision in no way conflicts with any federal appellate decision. Likewise, it is not in conflict with the Georgia District Court Opinion relied upon by Petitioner as the underlying statutes are totally distinguishable.

Contrary to Petitioner's assertion, the issues presented in this case will not have a great impact on public policy as only six (6) states, including Oklahoma, have similar statutes. Finally, Petitioner's due process was not denied in that all factual determinations were previously made in the district court proceedings.

For these reasons, the State Board of Embalmers and Funeral Directors respectfully requests this Court deny a Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,

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June 1, 1999

APPENDIX A

ARTICLE 1. FUNERAL DIRECTORS, EMBALMERS, AND OPERATORS OF FUNERAL ESTABLISHMENTS

PART 1. GENERAL INSTRUCTIONS

43-18-1 Definitions.

As used in this article, the term:

(1) "Alternative container" means any receptacle or enclosure which is of sufficient strength to be used to hold and to transport a dead human body.

(2) "Apprentice" means a person who practices embalming, funeral directing, or both, under the direct supervision of a funeral director, embalmer, or both, in this state.

(3) "Board" means the State Board of Funeral Service.

(4) "Casket" means a container which is designed for the encasement and viewing of a dead human body.

(5) "Cremation" means the reduction of the dead human body to residue by intense heat.

(6) "Crematory" means a place that is owned by a funeral director or funeral establishment where cremation is performed and which is open to the public.

(7) "Direct supervision" means that the embalmer, funeral director, or both, are present overseeing the activities of the apprentice.

(8) "Embalmer" means a person who practices embalming or uses in connection with that person's name

the words "embalmer," "licensed embalmer," "undertaker," or "mortician" or offers or holds himself or herself out as offering such services.

(9) "Final disposition" means the final disposal of a dead human body whether it is by, but not limited to, earth interment, above-ground interment, cremation, burial at sea, or delivery to a medical institution for lawful dissection if the medical institution assumes responsibility for disposal.

(10) "Funeral" or "funeral services" means the observances, services, or ceremonies held for dead human bodies.

(11) "Funeral director" means a person who practices funeral directing or uses in connection with that person's name or with a picture of that person the words "funeral director," "licensed funeral director," "undertaker," or "mortician" or offers or holds himself or herself out as offering such services.

(12) "Funeral director in full and continuous charge" means a funeral director who is approved by the board to assume full responsibility for the operations of a particular funeral establishment and who shall ensure that said establishment complies with this article and with all rules promulgated pursuant thereto.

(13) "Funeral establishment" means a place where embalming or funeral directing is practiced and which is open to the public and transacting business relating to funeral services.

(14) "Funeral merchandise" means the goods that may only be sold or offered for sale by a funeral director

working in a funeral establishment and includes, but is not limited to, a casket or alternative container, but does not include an outer burial container or cemetery marker.

(15) "Funeral service contract" means a written or oral agreement between a funeral director or funeral establishment and a legally authorized person for the embalming, funeral, or final disposition of a dead human body.

(16) "Legally authorized person" means the deceased's surviving spouse, a son or daughter who is 18 years of age or older; the deceased's parent, a brother or sister who is 18 years of age or older; any other person who is 18 years of age or older and who is in the next degree of kinship to the deceased; the deceased's guardian or personal representative; or a public health officer.

(17) "Outer burial container" means an enclosure into which a casket is placed, including, but not limited to, a vault made of concrete, steel, fiberglass, or copper, a sectional concrete enclosure, a crypt, or a wooden enclosure.

(18) "Practice of embalming" means disinfecting or preserving or attempting to disinfect or preserve dead human bodies by replacing certain body fluids with preserving and disinfecting chemicals.

(19) "Practice of funeral directing" means making or directing, at need or preneed, arrangements for the preparation and transportation of dead human bodies for final disposition and the supervision and direction of all funeral services.

(20) "Retort" means a furnace where dead human bodies are cremated.

(21) "Soliciting" means the making of any uninvited contact with another person by a funeral director or by a funeral director's agent, assistant, employer, or employee for the purpose of the sale of funeral services or merchandise but shall not mean any advertising which is directed to the public in general.

(Code 1981, § 43-18-1, enacted by Ga. L. 1990, p. 1372, § 1; Ga. L. 1992, p. 2762, § 1.)